79-1481

No.

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1979

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS DICKINSON and JOSEPH MONTANINO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The judgment order of the court of appeals (App. A, *infra*, 1a-2a) and the opinion of the district court (App. C, *infra*, 4a-23a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1979. A timely petition for rehearing

was denied on January 21, 1980 (App. B, *infra*, 3a). On February 12, 1980, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including March 21, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether respondents, who were charged with theft of an interstate shipment of freight, unlawful receipt and concealment of that stolen property, and conspiracy to commit those offenses, were entitled to obtain the suppression of evidence seized during the search of a warehouse in which respondent Montanino rented space.

STATEMENT

Following their indictment in the United States District Court for the Eastern District of New York, respondents moved for the suppression of evidence seized by FBI agents during a search, conducted pursuant to a warrant, of a warehouse in which respondent Montanino rented space. The district court ordered suppression of that evidence (App. C, *infra*, 4a-23a). On the government's appeal under 18 U.S.C. 3731, the court of appeals affirmed on the opinion of the district court (App. A, *infra*, 1a-2a).

1. On September 12, 1978, a tractor-trailer truck carrying 250 bags of unprocessed coffee beans to Baltimore, Maryland, was hijacked by respondent Dickinson in Brooklyn, New York. Both the driver

of the truck and the shipping company gave the FBI detailed descriptions of the truck and its cargo of coffee beans (C.A. App. A17-A18, A43-A44).[1]

On September 14, 1978, an FBI agent engaged in surveillance of a warehouse at 91-95 Hope Avenue, Staten Island, New York, saw the stolen truck through the open roll-up door of the warehouse (C.A. App. A18). Later that day, the FBI obtained a warrant from a United States Magistrate to search the warehouse (C.A. App. A90). The FBI maintained continuous surveillance of the warehouse in order to apprehend anyone who sought to drive the truck away, but no one attempted to do so during the five-day period provided for execution of the warrant (C.A. App. A21-A22, A25, A50). Accordingly, on September 18, the agents obtained a second search warrant (C.A. App. A25, A93). The warrant specified the property to be seized from the warehouse as "merchandise stolen from an interstate shipment of freight originating in New York, New York and destined for Baltimore, Maryland, in violation of Title 18, United States Code, Section 659 * * *" (C.A. App. A93). The affidavit of the FBI agent submitted in support of the warrant described the stolen tractor-trailer as "a red, General Motors Corporation Model, bearing Maryland license plate FB5859 * * * [and] a 45 foot Gindy silver container [trailer]" (C.A. App. A94), and it requested authority to search the desig-

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[1] "C.A. App." refers to the government's Appendix in the court of appeals.

nated warehouse for "unprocessed coffee beans and a tractor trailer stolen from interstate shipment * * *" (C.A. App. 95).

The FBI continued its surveillance of the warehouse, but again no one attempted to move the truck (C.A. App. A21-A22, A50). Therefore, on September 28, 1978, a group of FBI agents executed the warrant. The agent in charge of the search had read the warrant and supporting affidavit, and he informed the other agents of the property to be seized; at the time of the search, the agents had with them a copy of the warrant but not of the affidavit (C.A. App. A23-A24, A26, A37-A39, A43, A54-A55).

When the roll-up door of the warehouse was opened at approximately 7:00 a.m. on the morning of September 28, the FBI agents approached the building and, after observing the hijacked truck inside, identified themselves to the person at the warehouse, Mr. DeMarco, and stated that they had a search warrant. DeMarco said that he did not own the warehouse, and he asked the agents to wait for the owner before conducting the search. The agents agreed, and the owner, Mr. Frank Mazzacappa, arrived approximately 30-45 minutes later. The agents identified themselves to Mazzacappa and stated that they had a search warrant; Mazzacappa expressed no objection to the search, saying that it was fine, that he had nothing to hide, and that the agents could look for whatever they wanted (C.A. App. A27-A29, A32, A56-A57).

The agents then began the search of the warehouse. Mazzacappa told the agents that he, his brother Sam, DeMarco, and two other persons, including one Joe LaRosa, used the warehouse, and that the truck in question belonged to LaRosa; it was subsequently learned that the person known as Joe LaRosa was in fact respondent Montanino. Mazzacappa stated that LaRosa rented space in the warehouse, for which he paid $100 per month. The interior of the warehouse, apart from a small office, consisted of a large open area without partitions or physical divisions, and Mazzacappa explained that no particular area was assigned to any individual and that no one had an exclusive right to use any given portion of the warehouse. The agents confined their search to the area and the items that were used by Montanino. The stolen truck and bags of coffee beans, as well as several other items, were then seized (C.A. App. A22-A23, A29-A33, A35, A41-A42, A51-A52, A55).

2. Based on the evidence seized during the search of the warehouse, respondents were charged in a three-count indictment with stealing the unprocessed coffee beans from a shipment of freight in interstate commerce, in violation of 18 U.S.C. 659 and 2, unlawfully receiving and concealing the stolen coffee beans, in violation of 18 U.S.C. 2315 and 2, and conspiring to commit those offenses, in violation of 18 U.S.C. 371 (C.A. App. A5-A6). Respondents moved to suppress the seized evidence on the ground that the search violated the Fourth Amendment. Finding that the warrant was invalid and the search there-

fore unlawful, the district court ordered that "[respondents'] motion to suppress said evidence is granted in all respects" (App. C, *infra*, 23a).[2] The court also found that Dickinson was entitled to challenge the validity of the search on the basis of the "automatic standing" rule of *Jones* v. *United States*, 362 U.S. 257 (1960) (App. C, *infra*, 6a n.1); Dickinson's "automatic standing" was not limited to any particular counts of the indictment.[3] Moreover, although the suppression order clearly extended to Montanino, the court did not separately refer to his "standing" or discuss the parties' contentions concerning Montanino's "actual standing" based on his rental of space in the warehouse.

3. On the government's appeal, the court of appeals affirmed by judgment order "on the opinion of [the court] below" (App. A, *infra*, 2a). The government sought rehearing before the panel of the court

[2] The district court held that the warrant on its face did not describe the property to be seized with sufficient particularity to satisfy the Fourth Amendment and that neither the description of the property in the supporting affidavit nor the agents' actual knowledge of the property in question could be used to buttress the warrant (App. C, *infra*, 7a-16a). The court also determined that the search could not be justified without regard to the warrant under a theory of consent or of plain view (*id.* at 16a-23a). We do not present those issues for review by this Court.

[3] The government had initially conceded (C.A. App. A116) that Dickinson had "automatic standing" with respect to the concealment count of the indictment, but this concession was withdrawn at the suppression hearing (*id.* at A11-A12) in light of the Court's decision in *Rakas* v. *Illinois*, 439 U.S. 128 (1978).

of appeals to clarify whether Dickinson's "automatic standing" was applicable to the conspiracy count of the indictment and whether Montanino's "standing" was based on the "automatic standing" rule or on his reasonable expectation of privacy in the searched warehouse.[4] The court denied the rehearing petition without explanation (App. B, *infra*, 3a).

REASONS FOR GRANTING THE PETITION

The courts below relied on the "automatic standing" rule in suppressing the evidence from use against respondent Dickinson. The continued validity of that rule is currently before the Court in *United States* v. *Salvucci*, cert. granted, No. 79-244 (Dec. 10, 1979), and *Rawlings* v. *Kentucky*, cert. granted, No. 79-5146 (Dec. 10, 1979), which are scheduled for oral argument on March 26, 1980. For the reasons discussed in our briefs in *Salvucci*,[5] we believe that the "automatic standing" rule should be abolished. In view of *Salvucci* and *Rawlings*, we suggest that disposition of this petition be deferred pending decision in those cases.

In addition to the issue of the general validity of the "automatic standing" rule, this case also presents an important question of the correct applica-

[4] The government had originally raised both of these issues in its briefs to the panel (see Govt. Br. 9-14; Govt. Reply Br. 1-5, 6).

[5] We are sending copies of our briefs in *Salvucci* to respondents' counsel.

tion of that rule. Although not completely clear, it appears that the courts below have applied the "automatic standing" rule to a charge of conspiracy to steal interstate freight and unlawfully to receive and conceal such stolen property. The government in its petition for rehearing sought unsuccessfully to gain clarification on this point. If the lower courts have so held, however, they are manifestly in error. "Automatic standing" exists only when "possession of the seized evidence is itself an essential element of the offense with which the defendant is charged * * *." *Simmons* v. *United States*, 390 U.S. 377, 390 (1968). See also *Brown* v. *United States*, 411 U.S. 223, 229 (1973); *Jones* v. *United States*, *supra*, 362 U.S. at 258. A charge of conspiracy does not require possession of the seized evidence as an essential element of the offense, and therefore a defendant charged with conspiracy cannot invoke the "automatic standing" rule. See, *e.g.*, *United States* v. *Rios*, 611 F.2d 1335, 1345-1346 (10th Cir. 1979); *United States* v. *Baucom*, 611 F.2d 253, 255 (8th Cir. 1979); *United States* v. *Byers*, 600 F.2d 1130, 1132 (5th Cir. 1979); *United States* v. *Mazzelli*, 595 F.2d 1157, 1159 (9th Cir. 1979), petition for cert. pending on other grounds *sub nom. United States* v. *Conway*, No. 79-393 (filed Sept. 7, 1979); *United States* v. *Crowell*, 586 F.2d 1020, 1026 (4th Cir. 1978), cert. denied, 440 U.S. 959 (1979); *United States* v. *Grunsfeld*, 558 F.2d 1231, 1241-1242 (6th Cir. 1977), cert. denied, 434

U.S. 872, 1016 (1978). The Second Circuit has also consistently held, both before and after its decision in the instant case, that "automatic standing" is inapplicable to a conspiracy charge. See *United States* v. *Penco*, 612 F.2d 19, 23 n.6 (2d Cir. 1979); *United States* v. *Riquelmy*, 572 F.2d 947, 951 (2d Cir. 1978); *United States* v. *Oates*, 560 F.2d 45, 56 n.7 (2d Cir. 1977); *United States* v. *Banerman*, 552 F.2d 61, 63 (2d Cir. 1977); *United States* v. *Galante*, 547 F.2d 733, 738 (2d Cir. 1976), cert. denied, 431 U.S. 969 (1977). If the Court abandons the "automatic standing" rule in *Salvucci* and *Rawlings*, it will be unnecessary to consider this question. If, however, the Court adheres to the "automatic standing" rule, we suggest that the appropriate course in the instant case, especially in view of the imprecision of the lower court's rulings, would be to remand for further consideration of this issue in light of *Salvucci* and *Rawlings*.[6]

Beyond the question of "automatic standing," respondent Montanino also asserted that he had "actual

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[6] We also doubt that the offense of theft of interstate freight charged in Count I falls within the "automatic standing" rule, since possession of the stolen property at the time of the search is not an essential element of that offense. Cf. *United States* v. *Sturgis*, 578 F.2d 1296, 1301-1302 (9th Cir.), cert. denied, 439 U.S. 970 (1978), and *United States* v. *Lang*, 527 F.2d 1264, 1266 (4th Cir. 1975), cert. denied, 424 U.S. 920 (1976) ("automatic standing" not applicable to charge of bank robbery). We acknowledge that the government did not raise this argument in the court of appeals (see Govt. Br. 12), but, especially since it presents solely a question of law, we believe that it should be open for consideration on remand.

standing" to contest the validity of the search based on his rental of space in the warehouse to store the hijacked truck and the stolen coffee beans.[7] Once again, despite the government's petition for rehearing, it is unclear whether the courts below passed on this issue. Given the circumstances of this case—and particularly that Montanino leased space in the warehouse under a false name, that the warehouse consisted of a completely open interior shared by several people in common, and that the interior of the warehouse could readily be seen from the street when the large roll-up door was open—we think it unlikely that Montanino had a legitimate expectation of privacy under the Fourth Amendment.[8] However, since it is uncertain whether the lower courts decided this issue,

[7] To the extent that he preserved the argument by timely asserting it (see C.A. App. A59), Montanino may also have an argument that he was entitled to challenge the search because of his possessory interest in the stolen property that was seized. This issue is presently before the Court in *Rawlings* and, at least indirectly, in *Salvucci*. See also *United States* v. *Conway*, petition for cert. pending, No. 79-393 (filed Sept. 7, 1979) (a copy of the government's petition in *Conway* is being sent to counsel for respondents).

[8] While common-law property interests are relevant in assessing one's reasonable expectation of privacy (*Rakas* v. *Illinois*, 439 U.S. 128, 143-144 n.12 (1978)), even the owner of the premises or property searched is not entitled to seek the suppression of evidence if he had no privacy interest that was invaded. See, *e.g.*, *United States* v. *Rios*, 611 F.2d 1335, 1345 (10th Cir. 1979); *United States* v. *Dall*, 608 F.2d 910, 914 (1st Cir. 1979), cert. denied, No. 79-5769 (Mar. 3, 1980); *United States* v. *Dyar*, 574 F.2d 1385, 1390 (5th Cir.), cert. denied, 439 U.S. 982 (1978).

we suggest that the proper disposition on this phase of the case would be to remand to the courts below for further consideration following their resolution of the foregoing "automatic standing" issues in light of *Salvucci* and *Rawlings*.[9]

CONCLUSION

The Court should dispose of the issue of "automatic standing" in accordance with its decisions in *United States* v. *Salvucci*, No. 79-244, and *Rawlings* v. *Kentucky*, No. 79-5146. The Court should remand the issue of "actual standing" for further consideration.

Respectfully submitted.

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MARCH 1980

[9] Because respondents did not have "automatic standing" on all counts even if the "automatic standing" rule is retained, it will be necessary, regardless of the outcome in *Salvucci* and *Rawlings*, to consider the question of Montanino's legitimate expectation of privacy.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

As a stated Term of the United States Court of Appeals of the Second Circuit, held at the United States Courthouse in the City of New York, on the fifteenth day of August one thousand nine hundred and seventy-nine.

Present: HONORABLE THOMAS J. MESKILL, *Circuit Judge*, HONORABLE ROBERT J. KELLEHER, *District Judge*,* HONORABLE ALBERT W. COFFRIN, *District Judge*.**

Docket No. 79-1170

UNITED STATES OF AMERICA, APPELLANT,

v.

LOUIS DICKINSON and JOSEPH MONTANINO,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for

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* Hon. Robert J. Kelleher, United States District Judge for the Central District of California, sitting by designation.

** Hon. Albert W. Coffrin, United States District Judge for the District of Vermont, sitting by designation.

the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court Court be and it hereby is affirmed on the opinion of Judge Bramwell below.

/s/ Thomas J. Meskill,
THOMAS J. MESKILL, U.S.C.J.

/s/ Robert J. Kelleher
ROBERT J. KELLEHER, U.S.D.J.

/s/ Albert W. Coffrin
ALBERT W. COFFRIN, U.S.D.J.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of January, one thousand nine hundred and eighty.

Present: HON. THOMAS J. MESKILL, *Circuit Judge*,
HON. ALBERT W. COFFRIN, HON. ROBERT J. KELLEHER, *District Judges*.

79-1170

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT,

v.

LOUIS DICKINSON and JOSEPH MONTANINO, DEFENDANTS-APPELLEES.

A petition for a rehearing having been filed herein by counsel for the

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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78 CR 611

UNITED STATES OF AMERICA

-against-

JOSEPH MONTANINO and LOUIS DICKINSON,
DEFENDANTS.

DECISION AND ORDER

BRAMWELL, D. J.

In the early morning hours of September 28, 1978, agents of the Federal Bureau of Investigation approached a green, one-story warehouse located at 91-95 Hope Avenue in Staten Island. For the previous fourteen days, numerous agents had been observing the warehouse through binoculars from a building across the street, their interest being focused on a warehouse window through which they could see a stationary, red gindy G.M.C. truck.

On that morning, the agents possessed a search warrant issued on September 18, 1978 which authorized them to search the previously identified premises and to seize

merchandise stolen from an interstate shipment of freight originating in New York, New York and destined for Baltimore, Maryland.

The front door to the warehouse being opened at approximately 7 a.m., the agents proceeded to walk a short distance into the premises. Upon doing so, they immediately encountered a Mr. DeMarco and promptly informed him that they possessed a valid search warrant. Mr. DeMarco responded that he did not own the warehouse. However, he invited them to wait inside the building pending the arrival of Mr. Mezzacappa, the building's owner. Rather than standing idle during this interim period, the agents photographed the truck and the warehouse's interior and exterior.

At approximately 7:45 a.m., Mr. Mezzacappa arrived and was immediately informed by the agents that they possessed a valid search warrant. Consequently, Mr. Mezzacappa permitted the agents to search the premises. Accordingly, the agents proceeded to the area where the truck was parked, examined the truck and its contents, and continued to photograph the surrounding area. During this period, an interview with Mr. Mezzacappa revealed that the truck had been brought to the warehouse by a lessee of the warehouse space, Mr. LaRosa, who was subsequently identified as the defendant Joseph Montanino. At approximately 10:00 a.m., the truck, its contents and various other objects were physically seized by the agents and removed from the warehouse.

On October 23, 1978, an indictment was handed up charging Louis Dickinson and Joseph Montanino with the theft of 250 bags of unprocessed coffee beans from a motor truck moving in interstate commerce in violation of 18 U.S.C. § 659 (1976). It further charged them with unlawfully receiving and concealing said bags in violation of 18 U.S.C. § 2315 (1976) and with conspiring to commit these offenses in violation of 18 U.S.C. § 371 (1976). Thereafter, Mr. Dickinson [1] and Mr. Montanino approached the bench urging

[1] In its initial memorandum of law, the government stated that under *Jones* v. *United States*, 362 U.S. 257 (1960), Mr. Dickinson had standing to challenge the seizure by virtue of his being charged in the concealment count of the indictment. At the suppression hearing, the government withdrew this concession under the authority of the recent Supreme Court decision in *Rakas* v. *Illinois*, —— U.S. ——, Slip No. 77-5781 (Sup. Ct. December 5, 1978). Transcript January 9, 1979 at 5-6. In *Rakas*, the Court stated:

> In *Jones*, the Court set forth two alternative holdings: it established a rule of "automatic" standing to contest an allegedly illegal search where the same possession needed to establish standing is an essential element of the offense charged; and second, it stated that "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress."

Slip Op. at 7. After rejecting the defendant's target theory standing argument, the Court proceeded to analyze the second of the *Jones*' alternative holdings. However, the automatic standing rule of *Jones* was not considered by the *Rakas* Court. Slip Op. at 7 n.4. Therefore, the Second Circuit's interpretation of the *Jones* automatic standing rule remains binding on this Court. Therefore, under *United States* v. *Galante*, 547 F.2d 733, 736-38 (2d Cir. 1976), *cert. denied*, 431 U.S. 969 (1977), and *United States* v. *Tortorello*, 533 F.2d 809, 813 (2d Cir.), *cert. denied*, 429 U.S. 894 (1976), Mr. Dickinson has standing to challenge the seizure under *Jones*.

the suppression of the evidence seized on September 28th on the ground that the September 18th search warrant was invalid on its face due to failure to particularly describe the objects to be seized. Accordingly, this motion gave rise to the instant Decision and Order.

In countering the defendants' argument for suppression, the government significantly concedes at the outset that the description of the goods in the September 18th warrant fails to pass the particularity requirement of the Fourth Amendment.[2] Rather than permitting its position to lie fallow, however, the government develops a variety of legal arguments which it claims justify the September 28th search and seizure. Despite the legal creativity of its arguments, this Court finds them unpersuasive.

REFERENCE TO THE SUPPORTING AFFIDAVIT

In attempting to clear the hurdle erected by the facial invalidity of the subject warrant, the government's primary contention is that the generality of the warrant is remedied by reference to the specific description set forth in the warrant's supporting af-

[2] Government's Motion in Opposition to Motion to Suppress at 4; Transcript January 9, 1979 at 7. *See, e.g. United States* v. *Klein*, 565 F.2d 183, 188-89 (1st Cir. 1977); *United States* v. *Townsend*, 394 F.Supp. 736, 745-47 (E.D. Mich. 1975). *Compare United States* v. *Rytman*, 475 F.2d 192 (5th Cir. 1973) (per curiam); *United States* v. *Scharfman*, 448 F.2d 1352 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972).

fidavit.[3] In support of this argument, the government cites numerous decisions from other circuits which hold that the supporting affidavit, in certain limited circumstances, may provide the particularity mandated by the Fourth Amendment. *See Montilla Records of Puerto Rico, Inc.* v. *Morales*, 575 F.2d 324, 328 (1st Cir. 1978) (Campbell, J. concurring); *United States* v. *Klein*, 565 F.2d 183, 186 n.3 (1st Cir. 1977); *United States* v. *Ford*, 553 F.2d 146, 169 n.64 (D.C. Cir. 1977); *United States* v. *Gusan*, 549 F.2d 15, 16 (7th Cir.), *cert. denied*, 430 U.S. 985 (1977); *United States* v. *Johnson*, 541 F.2d 1311, 1315 (8th Cir. 1976) (per curiam); *United States* v. *Freeman*, 532 F.2d 1098, 1100 (7th Cir. 1976) (per curiam); *United States* v. *Womack*, 509 F.2d 368, 382 (D.C. Cir. 1974), *cert. denied*, 422 U.S. 1022 (1975); *United States* v. *Lightfoot*, 506 F.2d 238, 242-43 (D.C. Cir. 1974) (per curiam); *United States* v. *Thompson*, 495 F.2d 165, 170, 170n.4 (D.C. Cir. 1974); *United States* v. *Huffman*, 470 F.2d 386, 393 n.7 (D.C. Cir. 1971), *rev'd on other grounds*, 502 F.2d 419 (D.C. Cir. 1974); *United States* v. *Rael*, 467 F.2d 333, 335 (10th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973); *United States* v. *Moore*, 461 F.2d 1236, 1238 (D.C. Cir. 1972). Since the under-

[3] There can be little doubt that the accompanying affidavit adequately described the stolen truck and established probable cause for issuance of the search warrant. Moreover, the affidavit, while not individually identifying each of the 250 bags of unprocessed coffee beans by serial number, did use the generic description "unprocessed coffee beans" and connected these bags with the aforementioned truck.

lying premise of these cases is founded upon the concept of incorporation by reference, and, in order to further simplify matters, these cases hereinafter will be referred to as the "Incorporation Cases." The government's contention, however, must be rejected for a variety of reasons.

The initial flaw with the government's theory is that its adoption would require this Court to assume a position inconsistent with the Second Circuit's decision in *United States* v. *Marti*, 421 F.2d 1263 (2d Cir. 1970), *cert. denied*, 404 U.S. 947 (1971). The *Marti* defendants were indicted for transporting obscene photographs and films in violation of 18 U.S.C. § 1465. These photographs and films were seized pursuant to three search warrants which authorized the seizure of any property "being used and/or possessed in violation of Section 235.05 subd. 1 (Obscenity) of the New York State Penal Law." 421 F.2d at 1267. Initially, the Court concluded that the search warrants were deficient on their face for failing to particularize the goods to be seized.

> This general direction on its face left to the executing officers the task of deciding which property was obscene in violation of the state obscenity law and thus subject to seizure. . . .
>
> . . .
>
> The warrants here essentially directed the executing officers to seize any materials found by them to be in violation of the New York obscenity laws. The warrants themselves gave no guidelines to the officers as to what is obscene and

> what is not. Thus, the warrants on their face left to the executing officials the discretion of deciding what materials were obscene.

Id. at 1267-68. Significantly, the Court also rejected the government's contention that the generality of the warrant was remedied by reference to its supporting affidavit which, as the Court noted, was "quite specific." *Id.* at 1267.

> But specificity is required in the warrant in addition to the affidavit in order to limit the discretion of the executing officials . . . and to give notice to the persons subject to the search what the officers are entitled to seize. . . .

Id. at 1268 (citations omitted).

In attempting to distinguish the clear import of this holding, the government argues that *Marti* involved First Amendment considerations, and that the Fourth Amendment's particularity requirement is most stringent when First Amendment rights are involved. *Stanford* v. *Texas*, 379 U.S. 476, 485 (1965); *United States* v. *Cangiano*, 464 F.2d 320, 325 (2d Cir. 1972), *vacated on other grounds*, 413 U.S. 913 (1973), *on remand*, 491 F.2d 905 (2d Cir. 1973) (per curiam), *cert. denied*, 418 U.S. 934 (1974). Accordingly, the government concludes that when First Amendment rights are not involved, as is the case here, the Fourth Amendment specificity requirement is relaxed. *United States* v. *Sultan*, 463 F.2d 1066, 1070 (2d Cir. 1972), *United States* v. *Scharfman*, 448 F.2d 1352, 1354 (2d Cir. 1971), *cert. denied*, 405 U.S. 919 (1972); *United States* v. *Auterbridge*, 375 F.Supp. 418, 419 (S.D.N.Y. 1974). These cases, however, do not stand for the broad proposition that the Fourth Amendment's specificity requirement is to be ignored in non-First Amendment's situations, or that an examination of the supporting affidavit can always cure a facially defective warrant. Instead, the warrants at issue in these cases contained a description of the goods to be seized and the question posed was whether that description satisfied the particularity requirement under the facts of each case. Thus, in *Sultan* the Court stated:

> In this context of a bankrupt corporation that had a wide-ranging inventory, the phrase "various general merchandise and assets of Sultan's Big Discount, Inc." was sufficiently specific.

463 F.2d at 1070. Of similar import is the following statement in *Auterbridge*:

> When circumstances make an exact description of the instrumentalities, a virtual impossibility, the searching officer can only be expected to describe the generic class of items he is seeking.

375 F. Supp. at 420, *quoting James* v. *United States*, 416 F.2d 467 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970). *See Steele* v. *United States*, 267 U.S. 498, 504 (1925) (description "cases of whisky" sufficient); *United States* v. *Dunloy*, Docket No. 78-1174 at 4663 (2d Cir. Sept. 5, 1978). Since, as previously noted, the instant warrant contained no description

whatsoever of the items to be seized, it is clear that the government's reliance on these cases is misplaced.[4]

In countering this conclusion, the government refers to the Second Circuit's decision in *United States* v. *Cangiano, supra,* as evidence that this circuit recognizes a distinction between First Amendment and non-First Amendment seizures, and that such recognition permits this Court to adopt the approach of the aforementioned "Incorporation Cases." In *Cangiano,* the Court stated:

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[4] Moreover, the Second Circuit in *Marti* did not purport to limit its decision to cases involving First Amendment materials. Significantly, the Court cited one New York State decision which indicated that reference to the supporting affidavit would not remedy a facially defective warrant, *People* v. *Coletti,* 39 Misc. 2d 580, 241 N.Y.S.2d 454 (West. Cty. 1963), and two state decisions which did permit the specificity of the supporting affidavit to remedy a facially defective warrant, *People* v. *Sanchez,* 53 Misc. 2d 672, 279 N.Y.S.2d 836 (Crim. Ct. Cty. N.Y. 1967); *People* v. *Hendricks,* 45 Misc. 2d 7, 256 N.Y.S.2d 78 (Sup. Ct. Queene Cty. 1965), *rev'd on other grounds,* 25 N.Y.2d 129, 303 N.Y.S.2d 33, 250 N.E.2d 323 (1969). Since none of the New York cases involved materials subject to First Amendment protections, it would appear that the *Marti* Court was cognizant that differing approaches might be employed in First and non-First Amendment situations. However, the Court's statement that particularity is required in the warrant itself to limit the discretion of the executing officers and to give notice to the person subject to the search, *Marti, supra* at 1268, applies with the same force to all Fourth Amendment searches and seizures. Thus, by refusing to rely on the affidavit to cure the generality of the warrant in the context of a seizure involving First Amendment considerations, it would appear that the Second Circuit implicitly rejected any distinction between seizures subject to First Amendment protections and seizures outside the scope of the First Amendment.

> Moreover, assuming that this were a situation where the generality of the warrant could be cured by the specificity of the affidavit, the vice remains, as the affidavit, "gave no guidance to the officers as to what is obscene and what is not."

464 F.2d at 326. This statement, however, is merely dicta and the government's interpretation would appear to be at odds with the Court's earlier holding in *Marti.* Thus, to harmonize the two cases, the *Cangiano* statement would appear to countenance reference to the supporting affidavit to remedy a minor non-facial generality that became apparent only at the time of the warrant's actual execution or thereafter. *See United States* v. *Campanile,* 516 F.2d 288, 291 (2d Cir. 1975). Here, considering there was a total absence of any description of the goods, such a deficiency cannot be characterized as minor.

Finally, even assuming that *Cangiano* permits this Court to adopt the approach employed by the "Incorporation Cases", the government's argument must fail for even a more compelling reason. The "Incorporation Cases" permit a warrant to be construed with reference to its supporting affidavit for purposes of sustaining the particularity requirement of the Fourth Amendment provided that two prerequisites are met: (1) that the affidavit accompanies the warrant at the time of the search and (2) that the warrant itself uses suitable words of reference which incorporates the affidavit by reference. *See, e.g., Moore* v. *United States,* 461 F.2d 1236, 1238 (D.C.

Cir. 1972). Here, the warrant does not incorporate the affidavit and thus, on its face, the warrant was not limited by any supporting document. Moreover, at the hearing on the motion to suppress, the government conceded that the supporting affidavit was not present at the time of the search.[5] Instead, the government contends that these prerequisites were met since the executing officers were all aware of the contents of the affidavit and acted in good faith by keeping their search and seizure within the permissible scope of the underlying affidavit. However, such an approach would require this Court to expand the incorporation theory farther than any other circuit court decision. Moreover, these arguments are the very arguments rejected by the *Marti* Court.

> Appellants' First Amendment rights cannot be adequately safeguarded by the recollection of the executing official of the specifics of his affidavit and his good faith in remaining within the restrictive confines implied by the affidavit. The fact that Detective Romandella in executing the warrants did an admirable job of looking for the specifics set out in the affidavit before seizing any materials, does not erase the fact that appellants were subject under the warrants to a greater exercise of power by Detective Romandella or any other peace officer who could have executed the warrants. The warrants and seizures here must fail despite the manner of the warrants execution. . . . We therefore, conclude that the warrants were general and that this defect was

[5] Transcript January 9, 1979 at 6, 33.

> not cured by the specificity of the supporting affidavit, the identity of the affiant and the executing officer, or the care of the executing officers in seizing only those films described in the affidavit.

Marti, 421 F.2d at 1268-69. *Cf.*, *United States* v. *Karathanos*, 531 F.2d 26, 33 (2d Cir.), *cert. denied*, 428 U.S. 910 (1976).

No less can be said here. The instant warrant is overbroad on its face. Although it speaks of "stolen goods," no identifying language appears therein which would enable anyone to ascertain which goods are indeed stolen. Thus, on its face, the warrant authorizes the indiscriminate search and seizure of all goods, irrespective of whether they are stolen or not stolen, irrespective of whether they are packaged or unpackaged, irrespective of their designated contents, and irrespective of their location in the warehouse. Clearly, such an authorization to exercise unbridled discretion does not pass constitutional muster. *See Stanford* v. *Texas*, 379 U.S. 476, 483 (1965); *Marron* v. *United States*, 275 U.S. 192, 196 (1976); *United States* v. *Bermudez*, 526 F.2d 89, 96-97 (2d Cir. 1975), *cert. denied*, 425 U.S. 970 (1976); *United States* v. *Dzialak*, 441 F.2d 212, 216 (2d Cir.), *cert. denied*, 404 U.S. 883 (1971).

Since the Court finds that the search and seizure cannot be justified under the authority of the warrant, suppression is mandated unless an exception to the warrant requirement is present. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 453 (1971); *United States*

v. *Clark*, 559 F.2d 420, 426 (5th Cir. 1977); *cert. denied*, 434 U.S. 969 (1978). With this legal principle in mind, the government has advanced two additional arguments in support of the admissibility of the evidence at issue. However, before examining the government's alternative arguments, the Supreme Court's admonition in *Coolidge* warrants repetition.

> Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." [T]he burden is on those seeking the exemption to show the need for it."

Coolidge, *supra* at 445-56. (footnotes omitted).

CARROLL-COOLIDGE SEIZURE

The government's primary warrantless search and seizure argument combines the plain view analysis of *Coolidge* v. *New Hampshire*, *supra*, and the automobile exception to the warrant requirement first enunciated in *Carroll* v. *United States*, 267 U.S. 132 (1925). While it is true that law enforcement officials are free to observe evidence and circumstances that are in plain view to the public, *see*, *e.g.*, *Harris* v. *United States*, 390 U.S. 234 (1968); *United States*

v. *Lee*, 274 U.S. 559 (1927); *Hester* v. *United States*, 265 U.S. 57 (1924), *Coolidge* makes it clear that the words "plain view" are not a talisman which "will justify a by-pass of the Fourth Amendment's warrant requirement," *United States* v. *Lisznyai*, 470 F.2d 707, 710 (2d Cir. 1972), *cert. denied*, 410 U.S. 987 (1973).

> [P]lain view *alone* is never enough to justify the warrantless seizure of evidence. This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated that the police may not enter and make a warrantless seizure.

Coolidge, 403 U.S. at 468. Significantly, the *Coolidge* Court went on to further clarify the parameters of a valid "plain view" seizure by noting that a plain view discovery must also be inadvertent in nature. *Id.* at 469. In elaborating on this precept, the Court stated:

> But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches

as "*per se* unreasonable" in the absence of "exigent circumstances."

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object though the police know its location and intend to seize it, then there is a violation of the express requirement of "Warrants . . . particularly describing . . . [the] things to be seized." The initial intrusion may, of course, be legitimated not by a warrant but by one of the exceptions to the warrant requirement. . . . But to extend the scope of such an intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

Id. at 470-71. Therefore, under the directives of *Coolidge*, before the plain view doctrine can be invoked to legitimize a warrantless seizure, not only must exigent circumstances exist which justify the failure to obtain a warrant but the plain view discovery itself must be inadvertent.

Applying this principle to the facts at hand, it is clear that the initial binocular observation of the truck through the warehouse window did not violate the defendants' constitutional rights. *See, e.g., United States* v. *Johnson*, 561 F.2d 832, 843 (D.C. Cir.), *cert. denied*, —— U.S. ——, 97 S.Ct. 2953 (1977); *United States* v. *Hanahan*, 442 F.2d 649, 651-54 (7th Cir. 1971); *United States* v. *Honore*, 450 F.2d 31, 33

(9th Cir. 1971), *cert. denied*, 404 U.S. 1048 (1972). Similarly, no constitutional violation occurred when the agents saw the truck upon entering the warehouse through the open door. *See United States* v. *Berkowitz*, 429 F.2d 921, 924-25 (1st Cir. 1970). However, despite the fact that the disputed items were in plain view at the time of actual seizure, at that time, the government agents had known for fourteen days that the goods were there, and had entered the warehouse with the specific intent to seize them. Therefore, at the time of seizure, the plain view discovery is more accurately characterized as intentional and calculated rather than inadvertent and accidental. *Cf. Liszanyai, supra* at 710.

However, even assuming that the plain view discovery was inadvertent under *Coolidge*, no exigent circumstances existed at the time of the seizure to justify a warrantless seizure. In fact, the absence of any such exigency is evident from the fact that the FBI agents had permitted the goods to remain undisturbed in the warehouse for a full fourteen days prior to the September 28th seizure. Indeed, the record is devoid of any indication that a material change in the situation would occur during the brief time it would have taken to secure a proper warrant. *See Taylor* v. *United States*, 286 U.S. 1, 6 (1932); *Niro* v. *United States*, 388 F.2d 535 (1st Cir. 1968); *United States* v. *Block*, 202 F.Supp. 705 (S.D.N.Y. 1962).

The government's reliance on the *Carroll* automobile exception does not alter this conclusion as the Supreme Court has interpreted *Carroll* to hold that

> a search warrant [is] unnecessary where there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. . . . [T]he opportunity to search is fleeting. . . .

Chambers v. *Maroney*, 399 U.S. 42, 51 (1970). The justification for the warrantless search and seizure under such circumstances is predicated on the

> necessary difference between the search of a store, dwelling house, or other structure in respect of which a proper official warrant may be obtained, and a search of a ship, motor boat, wagon, or automobile, for contraband goods, *where it is not practicable to secure a warrant*, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Carroll, *supra* at 153. (emphasis in original). Thus *Carroll* does not authorize the seizure of any automobile, but only those which are movable and for which "it is not practicable to secure a warrant." *Id.* Here, the FBI agents had at least two weeks' opportunity to obtain a proper warrant. They knew the exact description of the truck and the situation did not lend itself to an easy disposition of the goods. The agents were maintaining constant surveillance

on the truck and bags which were located on private property and, as already noted, there was no indication that a material change in the situation was about to occur.

Under such circumstances, no exigency existed and a valid warrant should have and could have been obtained. *See Cardwell* v. *Lewis*, 417 U.S. 583, 593 (1974); *Coolidge*, *supra* at 458-64; *United States* v. *McCormick*, 502 F.2d 281, 286-88 (9th Cir. 1974); *United States* v. *Sokolow*, 450 F.2d 324, 325-26 (5th Cir. 1971) (per curiam). *Cf. United States* v. *Marchand*, 564 F.2d 983, 993 (2d Cir. 1977), *cert. denied*, 434 U.S. 1050 (1978).

CONSENT

Finally, the government seeks to justify the warrantless seizure on the "consent" to search and seize which was allegedly given by Mr. Mezzacappa, the owner of the warehouse. While it is undisputed that the consent obtained from a third party possessing common authority and control over a premises will justify a warrantless search and seizure, the government must establish that the alleged consent was freely and voluntarily given. *United States* v. *Matloch*, 415 U.S. 164 (1974); *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973); *Frazier* v. *Cupp*, 394 U.S. 730 (1969); *Bumper* v. *North Carolina*, 391 U.S. 543 (1968); *United States* v. *Pravato*, 505 F.2d 703 (2d Cir. 1974); *United States* v. *Ellis*, 461 F.2d 962 (2d Cir.), *cert. denied*, 409 U.S. 866 (1972);

United States v. *Gargiso*, 456 F.2d 584 (2d Cir. 1972); *United States* v. *Cataldo*, 433 F.2d 38 (2d Cir. 1970), *cert. denied*, 401 U.S. 977 (1971).

Here, the agents were initially permitted to remain on the premises by Mr. DeMarco only after they had informed him that a search warrant existed. Thereafter, the consent to search the premises was obtained from Mr. Mezzacappa after the agents had informed him that they possessed a valid search warrant. Under these circumstances, the Supreme Court's decision in *Bumper* v. *North Carolina*, *supra*, holds that such consent is not voluntary.

> The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that that there can be no consent under such circumstances.
>
> When a prosecutor seeks to rely upon consent to justify the lawfulness of the search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. *This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid.*

Bumper, 391 U.S. at 548-49 (footnotes omitted and emphasis supplied). *Compare United States* v. *Oliver*, 523 F.2d 253, 256, 259 (2d Cir. 1975); *United States* v. *Boston*, 508 F.2d 1171, 1178-79 (2d Cir. 1974); *United States* v. *Gradowski*, 502 F.2d 563, 564 (2d Cir. 1974) (per curiam).

CONCLUSION

In light of the foregoing discussion, it is clear that neither the search warrant nor any exception to the warrant requirement justifies the September 28th seizure. Accordingly, it is hereby ORDERED that the defendants' motion to suppress said evidence is granted in all respects.

/s/ Henry Bramwell
U.S.D.J.

Dated: Brooklyn, New York
February 14th, 1979

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